UNITED STATES OF AMERICA	)	
	)	**GOVERNMENT RESPONSE**
v.	)	**TO DEFENSE MOTION TO**
	)	**DISMISS SPECIFICATIONS**
Manning, Bradley E.	)	**2, 3, 5, 7, 9, 10, 11, AND 15**
PFC, U.S. Army,	)	**OF CHARGE II**
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**24 May 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court deny the defense motion to dismiss Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II. 18 U.S.C. § 793(e) is neither unconstitutionally vague in violation of the Fifth Amendment to the United States Constitution, nor substantially overbroad in violation of the First Amendment.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. *Manual for Courts-Martial (MCM), United States*, Rule for Courts-Martial (RCM) 905(c)(2) (2008). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

The United States stipulates to the facts as set forth in the defense motion.

WITNESSES/EVIDENCE

The United States requests this Court consider the referred charge sheet in support of its response to the defense motion.

LEGAL AUTHORITY AND ARGUMENT

The defense argues that 18 U.S.C. § 793(e) is unconstitutionally vague on its face in violation of the Fifth Amendment because the phrases "relating to the national defense" and "to the injury of the United States or to the advantage of any foreign nation" do not provide the fair warning required by the Due Process Clause. Def. Mot. at 3. Additionally, the defense argues that 18 U.S.C. 793(e) is substantially overbroad in violation of the First Amendment because it "regulates a substantial amount of protected speech" and "infringes on the freedom of the press

to investigate and publish articles on national defense topics." Def. Mot. at 6. The defense arguments have no merit for the reasons set forth below.

I. THE DEFENSE SHOULD BE PRECLUDED FROM CHALLENGING 18 U.S.C. § 793(e) AS VAGUE ON ITS FACE.

At the outset, the defense should be precluded from mounting a facial vagueness challenge to 18 U.S.C. § 793(e), rather than an as-applied challenge, because there are no First Amendment rights implicated in this case. *See United States v. Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."). First Amendment cases are different and are "concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 36 (1963); *United States v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002).

Although it is unclear whether a First Amendment issue can ever arise in a prosecution under the Espionage Act, the Fourth Circuit, considering a vagueness challenge to § 793(d) and (e) in a leak case involving a naval intelligence employee, stated "Actually we do not perceive any First Amendment rights to be implicated here." *United States v. Morison*, 844 F.2d 1057, 1068 (4th Cir. 1988). Similarly, in *United States v. Kim*, the court rejected a defendant's First Amendment challenge in a prosecution for oral disclosures of classified information. *United States v. Kim*, 808 F. Supp. 2d 44, 56-57 (D.D.C. 2011). The court ultimately held that for purposes of the First Amendment, there was no difference between oral disclosures and written disclosures of classified information. *Id.* at 56. Further, the court noted the uniformly held view that government employees who sign security agreements lack protection under the First Amendment. *Id.* at 57 (citing *McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C. Cir. 1983); *Berntsen v. CIA*, 618 F. Supp. 2d 27, 29 (D.D.C. 2009)); *see also Morison*, 844 F.2d at 1070 ("[W]hen [§ 793(e) is] applied to a defendant in the position of the defendant here, there is no First Amendment right implicated.").

The accused in this case is charged with multiple specifications alleging willful communication of national defense information to unauthorized persons. The evidence will show that the accused signed multiple non-disclosure agreements. Accordingly, no First Amendment rights are implicated by application of 18 U.S.C. § 793(e) to the conduct in this case. The defense should be precluded from asserting a facial vagueness challenge to the statute.

II. 18 U.S.C. § 793(e) PROVIDES THE FAIR WARNING REQUIRED BY THE DUE PROCESS CLAUSE.

Assuming, *arguendo*, First Amendment rights are implicated in this case, 18 U.S.C. § 793(e) is not unconstitutionally vague because it provides fair warning to persons of ordinary intelligence. In particular, the phrase "related to the national defense" has been repeatedly challenged by defendants on the basis of impermissible vagueness and has survived the scrutiny

of the Supreme Court and multiple jurisdictions. *See* discussion *infra* Part II.A. While the defense motion does an adequate job summarizing the evolution of case law in this area, the defense has failed to distinguish this case from all the other cases that have considered 18 U.S.C. § 793(e) and related provisions and found the statute to be sufficiently definite.[1]

A. The Phrase "Relating to the National Defense" is not Unconstitutionally Vague.

Due process requires that a statute be declared void when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). There is a strong presumption of validity that attaches to an Act of Congress; hence, "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Jordan v. De George*, 341 U.S. 223, 231 (1951); *see also Williams*, 553 U.S. at 305 ("Its basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague."). Clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute. *See United States v. Lanier*, 520 U.S. 259, 266 (1997).

The defense argues that the phrase "relating to the national defense" is unconstitutionally vague because it fails to give fair warning of "what information comes within its sweeping scope." Def. Mot. at 3. However, every court that has had occasion to consider the phrase in the vagueness context has rejected the argument. In *Gorin v. United States*, 312 U.S. 19 (1941), the Supreme Court considered the same phrase in § 2(a) of the Espionage Act (the predecessor to § 793). The Court found the term "national defense" had a "well understood connotation" and held that the "language employed [in § 2(a)] appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process." *Id.* at 28. The defense motion makes no attempt to distinguish the holding in *Gorin* from this case.

Since the Supreme Court's decision in *Gorin*, no other court has found the phrase "relating to the national defense" unconstitutionally vague in any context, specifically in cases involving charges under § 793. *See Morison*, 844 F.2d at 1071-74 (rejecting vagueness challenge and upholding the language of § 793(d) and (e)); *United States v. Dedeyan*, 584 F.2d 36, 39 (4th Cir. 1978) (rejecting vagueness challenge and upholding the language of § 793(f)); *United States v. Boyce*, 594 F.2d 1246, 1252 n.2 (9th Cir. 1979) (upholding the language of §§ 793 and 794); *United States v. Rosen*, 445 F. Supp. 2d 602, 617-22 (E.D. Va. 2006) (rejecting vagueness challenge and upholding the language of § 793(d) and (e)); *Kim*, 808 F. Supp. 2d at 53 (rejecting vagueness challenge and upholding the language of § 793(d)).

While it is true, as the defense notes, that the Fourth Circuit has provided further judicial gloss on the phrase "relating to the national defense," the defense fails to establish why further refinement cannot remedy the vagueness concerns of language the Supreme Court considered

[1] 18 U.S.C. § 793(e) provides that "[w]hoever having unauthorized possession of...information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted...the same to any person not entitled to receive it...[s]hall be fined under this title or imprisoned not more than ten years, or both. 18 U.S.C. § 793(e).

"sufficiently definite" without judicial gloss. *Gorin*, 312 U.S. at 28; *see also Lanier*, 520 U.S. at 266 (noting that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute"); *Morison*, 844 F.2d at 1071 ("[A]ll vagueness may be corrected by judicial construction which narrows the sweep of the statute within the range of reasonable certainty."). In fact, the Fourth Circuit recently noted that the judicial glosses refining the meaning of "related to the national defense" arguably offer "more protection to defendants than required by *Gorin*." *United States v. Squillacote*, 221 F.3d 542, 580 n.23 (4th Cir. 2000). Finally, the defense makes no attempt to assert that these judicial glosses are inconsistent in any way, except to say that the "precise meaning of [the] phrase has eluded the courts." Def. Mot. at 5. Refinement through judicial gloss does not mean indecision or inconsistency, which might provide support for the defense position. Accordingly, this Court should find the phrase "relating to the national defense" sufficiently definite to overcome any claim of unconstitutional vagueness in violation of the Fifth Amendment.

B. The Phrase "to the Injury of the United States or to the Advantage of Any Foreign Nation" is not Unconstitutionally Vague.

The defense also argues that the phrase "to the injury of the United States or to the advantage of any foreign nation" is unconstitutionally vague. Def. Mot. at 4. While the United States is unaware of any case that challenges this specific phrase as unconstitutionally vague, courts have held that the phrase "reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" is an additional *mens rea* requirement in cases where the accused is charged with disclosures of intangible information, such as oral disclosures of classified information. *See Rosen*, 445 F. Supp. 2d at 627 ("[A]dded scienter requirement is yet another ground for rejecting the defendants' vagueness challenge here."); *see also Kim*, 808 F. Supp. 2d at 51 (discussing Congress' decision to impose a *mens rea* requirement for the communication of "information"); 18 U.S.C. § 793(e). The phrase, when read with the words immediately preceding it in the statute ("reason to believe could be used"), is more accurately characterized as a limiting factor, rather than as a phrase inviting uncertainty as to its scope.

In any event, the phrase does not render § 793(e) unconstitutionally vague because of the other limitations of the statute. In particular, the statute requires the United States to prove the accused "willfully" communicated national defense information. 18 U.S.C. § 793(e). Thus, the United States must establish beyond a reasonable doubt that the accused had "knowledge that the conduct [at issue] was unlawful." *Bryan v. United States*, 524 U.S. 184, 191-92 (1998). The Supreme Court has repeatedly recognized that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *see also Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) ("[S]cienter requirements alleviate vagueness concerns."). Indeed, this Court held that a "knowing" scienter requirement "mitigates a law's vagueness especially with respect to actual notice of the conduct proscribed." Court's Ruling, dated 26 April 2012 (citing *United States v. Moyer*, 2012 WL 639277 (3rd Cir. 2012)). Moreover, the Supreme Court has held that a willfulness scienter requirement substantially undercuts any vagueness challenge to a statute's other terms. *See United States v. Ragen*, 314 U.S. 513, 524 (1942). But more importantly for the purposes of this case, the Fourth Circuit has relied on the "willfulness" scienter requirement in § 793(d) to reject a vagueness

challenge to that provision. *See Morison*, 844 F.2d at 1071; *see also Gorin*, 312 U.S. at 27-28 (rejecting vagueness challenge based on scienter requirement in statute); *Kim*, 808 F. Supp. 2d at 54 ("Because the Government must prove that Defendant knew his conduct was unlawful, he cannot complain that he did not have fair warning that he could be criminally prosecuted for his actions."). In short, even if there are legitimate vagueness concerns with respect to the phrase "to the injury of the United States or to the advantage of any foreign nation," they are negated by the willfulness requirement of § 793(e).

III. 18 U.S.C. § 793(e) IS NOT SUBSTANTIALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

A law may be invalidated as overbroad under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 522 US 442, 449 n.6 (2008)). The overbreadth doctrine is an exception to the generally applicable rules regarding facial challenges, in that it allows a defendant to raise the First Amendment rights of third parties whose "constitutionally protected speech may be 'chilled' by the specter of the statute's punishment." *Rosen*, 445 F. Supp. 2d at 642 (citing *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003)). "Invalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" *Williams*, 553 U.S. at 293 (quoting *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999)). As such, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293. A statute should be construed to avoid constitutional problems, if possible. *See United States v. Ferber*, 458 U.S. 747, 769 n.24 (1982).

The defense argues that 18 U.S.C. § 793(e) is substantially overbroad because it "regulates a wide range of speech." Def. Mot. at 6. However, it is not enough to say that a statute applies broadly. In order for a statute to be invalidated as overbroad, the applications must be unconstitutional and they must be judged in comparison to the legitimate applications. *See Stevens*, 130 S. Ct. at 1587; *Rosen*, 445 F. Supp. 2d at 643. Like the defense assertion of impermissible vagueness, § 793 has endured similar challenges on the basis of substantial overbreadth. *See Rosen*, 445 F. Supp. 2d at 643; *Morison*, 844 F.2d at 1076. The court in *Rosen*, using the analysis discussed above, construed various terms and provisions of § 793(d) and (e) and ultimately concluded that the statute was "narrowly and sensibly tailored to serve the government's legitimate interest in protecting the national security," and judged its effect on First Amendment freedoms as "neither real nor substantial" in relation to the statute's legitimate sweep. *Rosen*, 445 F. Supp. 2d at 643. Similarly, the court in *Morison* held that there was no fatal overbreadth with respect to the terms "national defense" and "one not entitled to receive," as courts had narrowed the constructions of those terms. *See Morison*, 844 F.2d at 1076.

The defense also argues that § 793(e) "poses substantial dangers to the free speech rights of reporters who investigate and publish stories on national defense related topics." Def. Mot. at 7. The concern is that a reporter could be subjected to criminal prosecution under the statute if

the United States proves every element of the statute beyond a reasonable doubt. *See* Def. Mot. at 7. Aside from the fact that § 793(e)'s effect on First Amendment rights has been judged neither real nor substantial, the Supreme Court tacitly approved such an application of § 793(e) in *New York Times Co. v. United States*, 403 U.S. 713—the "Pentagon Papers" case. *See Rosen*, 445 F. Supp. 2d at 638-39.

In *Rosen*, the defendants were employed by the American Israel Public Affairs Committee as lobbyists and were charged with conspiring to transmit information relating to the national defense to those not entitled to receive it, in violation of 18 U.S.C. § 793(g). *Id.* at 607-08. The *Rosen* defendants argued that the First Amendment bars Congress from punishing persons for disclosure of national defense information when they do not have a special relationship with the government. *Id.* at 637. In considering the contention, the *Rosen* court discussed the concurring opinions of Justices Stewart, White, and Marshall in the "Pentagon Papers" case. *Id.* at 638. While the Supreme Court was confronted with significant First Amendment issues raised by their consideration of the constitutionality of a prior restraint on the press, and ultimately denied the United States' request for an injunction preventing the New York Times and Washington Post from publishing the contents of the "Pentagon Papers," the *Rosen* court noted that the concurring opinions explicitly acknowledged the viability of a prosecution of the newspapers under applicable criminal law. *Id.*; *see New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring); *id.* at 737 (White, J., concurring); *id.* at 745 (Marshall, J., concurring). As such, the defense argument – that § 793(e) is fatally overbroad because it potentially permits the criminal prosecution of a reporter – is without merit. At most, overbreadth may be an issue when the statute is applied to a certain set of facts, but the hypothetical itself does not render § 793(e) substantially overbroad. *See Williams*, 553 U.S. at 303 ("The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'") (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). Thus, for the reasons stated above, 18 U.S.C. § 793(e) is not substantially overbroad in violation of the First Amendment.

CONCLUSION

The United States respectfully requests this Court DENY the defense motion to dismiss Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II. For the reasons stated above, 18 U.S.C. § 793(e) is neither unconstitutionally vague in violation of the Fifth Amendment, nor substantially overbroad in violation of the First Amendment. Additionally, the United States joins the defense in their request to provide instructions that further define 18 U.S.C. § 793(e), but requests that the Court adhere to the Scheduling Order dated 25 April 2012, which provides for litigation concerning proposed members instructions in phase 3a.

JODEAN MORROW
CPT, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 24 May 2012.

JODEAN MORROW
CPT, JA
Trial Counsel